

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KERRY HICKS,

Petitioner, No. CIV S-02-1040 LKK JFM P

vs.

TOM CAREY, Warden,

Respondent. ORDER

Petitioner, a state prisoner proceeding through counsel, has timely filed a notice of appeal of this court's March 13, 2006 denial of his application for a writ of habeas corpus.

Before petitioner can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy" the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that petitioner can demonstrate is "'debatable among jurists of reason,'" could be resolved differently by a different court, or is "'adequate to deserve encouragement to proceed further.'" Jennings v. Woodford,

1 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).<sup>1</sup>

2 Petitioner has made a substantial showing of the denial of a constitutional right in  
3 the following issues presented in the instant petition: (1) the state courts deprived petitioner of  
4 his right to a defense by refusing to instruct the jury that petitioner reasonably believed that the  
5 complaining witness consented to accompany petitioner; and (2) the state court's finding that the  
6 admission of uncharged prior offenses was harmless error was an unreasonable application of  
7 federal law and had a substantial and injurious effect on the verdict.

8 Accordingly, petitioner's motion for certificate of appealability will be issued in  
9 the present action.

10 Petitioner is a state prisoner proceeding through counsel with an appeal from this  
11 court's denial of his application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In light  
12 of the complexity of the legal issues involved, the court has determined that the interests of  
13 justice require continued appointment of counsel before the appellate court. See 18 U.S.C.  
14 § 3006A(a)(2)(B); see also Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983).

15 Accordingly, IT IS HEREBY ORDERED that:

16 1. A certificate of appealability is issued in the present action.

17 2. Petitioner's March 17, 2006 motion for appointment of counsel is granted;

18 John Ward, attorney at law, is appointed to represent petitioner on appeal.

19 DATED: March 28, 2006.

20  
21 /s/Lawrence K. Karlton  
22 UNITED STATES DISTRICT JUDGE  
23  
24

25 /hick1040.830  
26

25 <sup>1</sup> Except for the requirement that appealable issues be specifically identified, the standard  
26 for issuance of a certificate of appealability is the same as the standard that applied to issuance of  
a certificate of probable cause. Jennings, at 1010.